THE CHALLENGE OF A NEW FEDERAL CIVIL PROCEDURE[1]

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I wonder if you know why it is that birds, in flying across the Mediterranean, are said to choose for their journey not the shortest distance from land to land, from the heel of the boot which is Italy to the mainland of Africa, but instead the widest portion of the ocean? This story may not be true, but it comes to me from my college days under a great mathematics teacher, now the Dean of Columbia College. He had presented a simple and direct solution of a problem which in our textbook had been the subject of a lengthy and complex demonstration. The following day, however, a student, when asked to give the problem, recited the discarded book analysis with naive literalness. Our teacher made no comment whatsoever upon the recitation, but first told us the story of the Mediterranean birds and then explained their strange conduct. For the route of their flight, now the widest expanse of water, had originally been the narrowest before the land receded into the sea and the birds, having once started on their course, continued for generations to follow it, though reason would dictate a change.

Many stories of similar kind might serve my present purpose; I choose this not only because of youthful memories connected with it, but because it seems to me to illustrate legal as well as ornithological psychology. So much of our legal thinking, particularly in the field of *procedure*—properly only the process or machinery for getting court work done efficiently and effectively—is dominated by reasons valid when trial by jury was supplanting compurgation and the ordeal, or the king's grace was being sought on principles of equity to ameliorate the severity of ancient law, that a brief excursion into a portion of this field, now most significant and challenging because of the opportunity at hand for real reform, may be profitable. I refer to the new federal civil procedure made possible by the grant of rule-making

[1]A lecture delivered at the Cornell Law School under the Frank Irvine Lectureship of the Phi Delta Phi Foundation May 4, 1935, with the addition of footnotes. Fuller documentation of the various points herein discussed may be found in the article by Charles E. Clark and J. W. Moore, *A New Federal Civil Procedure—I. The Background* (1935) 44 YALE L. J. 387; and see also the later installment of this article, to appear in the YALE L. J. for June, 1935. For the decision of the United States Supreme Court announced May 9, 1935, to establish uniform rules in both law and equity, as advocated in the lecture, see the "Epilogue" to the text at the end of the lecture.

power to the United States Supreme Court by the Act of Congress of June 19, 1934.[2]

Please do not misunderstand me. I do not cherish resentment against the antiquities of the law. In truth I love the traditionalism of our profession. Would we not miss the sonorous words of the ancient deed of land—to have and to hold, to his and their own proper use and behoof, warrant and forever defend—now preserved as the means of transfer of vast city skyscrapers; or the ancient oath of office of the attorneys—you will do no falsehood nor consent to any to be done, you will delay no man for lucre or malice but will exercise the office of attorney according to the best of your learning and discretion and with fidelity, as well to the court as to your client—words which still should inspire us to the nobler aspects of our profession? Nor should we be too disturbed by the inveterate habit of lawyers and judges of erecting their rationalizations—their hunches— as to the development of legal doctrines into exegeses of assumed history, for this justifies and stimulates the study of legal history, whose most important function is still perhaps to demonstrate the falsity of so much of what passes in its name. Thus, that "privity of estate" in the law of real covenants did not have the meaning to the ancient English property lawyers which Lord Kenyon ascribed to it in the later eighteenth century and which has bedeviled us ever since, that the ancient maxim "caveat emptor" had a different origin from that currently stated in American law, or that the ancient English law of common callings did not operate to justify Leo Nebbia in flouting the New York milk law regulations a year ago, or perhaps did not even support theatre ticket speculation as was ruled eight years ago in the Tyson case, are historical deductions which help to release us from doctrinal bondage. In the realm of procedure, however, the crowded calendar of a modern metropolitan court calls for methods unnecessary in Elizabeth's England, and it is definitely disturbing to find the habits of our ancestors, sensible in the light of their conditions, made into hard and final rules of law. We now have a realistic conception of how the law of procedure affects substantive rights and how rights definitely announced in the law may be completely or substantially lost by delay or ineffective enforcement. At best, it is difficult enough to combine the requirements of an orderly and impartial procedure with speed and efficiency in disposing of the mass

[2] 48 STAT. 1064, 28 U. S. C. A. §§ 723b, 723c (1934). For the legislative history of the Act see Clark and Moore, *supra* note 1; Sunderland, *The Grant of Rule-Making Power to the Supreme Court of the United States* (1934) 32 MICH. L. REV. 1116; Jaffin, *Federal Procedural Revision* (1935) 21 VA. L. REV. 504; *cf.* Clark, *Procedural Reform and The Supreme Court* (1926) 8 AMERICAN MERCURY 445.

of litigation which arises in our complex civilization. The problem should not be made even more complex by resurrecting old formulas supposedly abolished long ago. Nearly ninety years ago, there was initiated in this state a reform which has changed the procedure of all of the English-speaking world. Its fundamental characteristic was the one form of civil action, and the consequent abolition of both the ancient forms of action at law and the separate systems of law and equity. Yet only a few years ago your highest court, certainly among the most distinguished of tribunals, asserted that "the inherent and fundamental difference between actions at law and suits in equity cannot be ignored."[3] This was in spite of the constitutional permission and the statutory mandate of 1848 to that effect. And acting upon this precept, your trial and intermediate appellate courts have often ushered a suitor to the door of the courtroom on the theory that he is in the wrong court, that is, in equity when he should be at law, though he must come back, if his right is not now totally lost by lapse of time or change of circumstances, to the same court by exactly the same route and the same form of action. One of our basic problems is that of preventing the judicial machinery from solidifying and petrifying. It is unfortunate that history, rather than present serviceability, should so largely control our processes.

Today I desire to trace with you the movement for procedural reform as it affects the most extensive system, in fact the only national system, of courts in this country, namely those of the United States Government. The story has been a considerable one to date and now one of its most interesting chapters is opening, one which is properly a challenge to our profession and a test of its powers of adaptation to social needs.

It will be recalled by all students of our judicial system that the federal district or trial courts are both courts of law and courts of equity, the same district judge holding each court but sitting now on the "law," now on the "equity" side of the court, as it is said, meaning thereby that at one time he is hearing law cases and at another equity cases. Procedure in equity has also been uniform throughout the United States courts, being modelled on the English system of chancery, but modernized and brought up to date by the highly successful Uniform Equity Rules promulgated by the United States Supreme Court in 1912. Hostility in the colonies to the power of the English king had prevented the development of colonial courts of equity,

[3]Jackson v. Strong, 222 N. Y. 149, 118 N. E. 512 (1917). See Clark, *The Union of Law and Equity* (1925) 25 COL. L. REV. 1; WALSH, EQUITY (1930) 96–131. In general see CLARK, CODE PLEADING (1928) 44 *et seq.*

and when Congress came to carry out the constitutional mandate for courts of law and equity it had to create the latter, which it did, following the English model. It was desirable, however, for the procedure at law to follow that of the state where the federal court was being held and thus reduce opposition to acceptance of the federal system. Consequently there developed the principle whereby federal procedure at law conformed to that of the states, for many years as of stated dates, which were advanced from time to time. By 1872, in view of the rapid changes in state procedure due to the spread of the "reformed" or "code" pleading, such static conformity to state procedure of a certain date was confusing and uncertain and there was passed the Conformity Act, providing for continuing conformity "as near as may be" to the procedures of the various state courts. The principle of the Conformity Act, while long a subject of criticism, still continues, though passage by Congress of the Act of last June, which conferred upon the United States Supreme Court both rule-making power in actions at law and authority to unite the law and equity, probably points to its end. It is this rule-making Act which provides the opportunity for the present proposed reform of federal civil procedure.

The history of this reform contains many of the paradoxes which accompany attempts to improve social institutions.[4] As long ago as 1886, David Dudley Field, the father of the reformed pleading of New York of 1848 which has so dominated procedure ever since, urged the American Bar Association to press for reform of the federal system. Intermittently, other suggestions were made until in 1910 the American Bar Association started on its long campaign for rule-making power in the Supreme Court in actions at law. The Association's Committee on Uniform Judicial Procedure was then organized and under the militant leadership of its chairman, Mr. Thomas W. Shelton, and with the support of most of the leaders of the American bar, campaigned vigorously for the Act, so successfully, in fact, that in 1916 it was reported passed, and Mr. Shelton went to Washington to arrange for the ceremonial signing of the Act by the President only to find that the wrong bill had been passed. In 1922, largely in consequence of arguments by Chief Justice Taft, long a supporter of the measure, the sponsors added another section giving the Court power to unite the rules of law and equity, and the bill then took its final form. Unfortunately, however, it met the determined opposition of Senator Walsh, long a chairman of the Senate Committee on the Judiciary, who argued against forcing local attorneys to learn a new procedure for practice

[4]See references *supra* note 2.

in the federal courts. Some of his objections seemed to suggest also that the fairly satisfactory system of the western states, as applied in the federal courts, should not be superseded by an unsatisfactory uniform procedure, probably that of New York—an objection not without point. At length, in 1930, Mr. Shelton died, and under the new chairmen, the work of the committee languished. In 1932, the then chairman reported his own belief that a uniform system of laws in the federal courts was undesirable, and at the 1933 meeting in Grand Rapids, the committee was discontinued at his suggestion. Meanwhile, however, Senator Walsh had died, just as he was on the point of assuming office as Attorney General of the United States. In his stead, Homer S. Cummings was appointed Attorney General. In the winter of 1934, Mr. Cummings, in a speech before the Association of the Bar of the City of New York, advocated the American Bar Association's bill[5] and thereafter pressed for its enactment, with such skill that it was passed almost immediately, without debate and with substantially no opposition.

It is too early for the Supreme Court itself to take definite action putting the reform into effect. The Chief Justice of the United States, however, assumed leadership in the project at once, and he and the Attorney General have developed plans for testing the enlightened reaction of the profession. Major Edgar B. Tolman, the distinguished Editor-in-Chief of the American Bar Association Journal, has been appointed Special Assistant to the Attorney General to conduct research to aid the Court in the ultimate drafting of the bill and is now installed in the Department of Justice, engaged upon this task. At the suggestion of the Chief Justice, the Attorney General wrote to the Senior Circuit Judges asking them in turn to request the District Judges to appoint committees of federal practitioners to confer with the District Judges on suggestions for the new rules, these suggestions to be reported back to the Circuit Judges and by them considered in their recommendations to the Department. District committees, already appointed in the various federal districts, have evinced great interest in their task and have approached it in the proper spirit of determination and persistence. The Attorney General has also appointed a General Advisory Committee of nine, of which I have the honor to be a member.[6]

The district committees will afford an interesting experiment in the possibilities of eliciting the aid of large numbers of the profession

[5]Cummings, *Immediate Problems for the Bar* (1934) 20 A. B. A. J. 212; and see editorial (1934) 20 A. B. A. J. 224.

[6]See (1935) 18 J. Am. Jud. Soc. 163; (1935) 20 Mass. L. Q. 41–44; (1934) 20 A. B. A. J. 713–716.

in the actual exercise of the rule-making power. Without question the appointment of these committees has added greatly to the interest of the various members of the profession in the new developments and has thus afforded a basis for a sympathetic consideration of the new procedure when adopted. Since the committees have been asked to pass judgment and express opinion on a large variety of details (the Attorney General's letter of instruction lists some 48 subjects to be considered),[7] it is not to be doubted that many valuable and original suggestions will be developed. On the other hand, there is some danger implicit in the attempt to have large numbers of practitioners participate in the drafting of technical rules. There must undoubtedly result considerable waste motion and little possibility of agreement upon detail, until the court has officially chosen one or more drafts to be submitted to the groups for criticism. But the most serious danger, it is thought, is that the committees may develop a natural pride and hence a vested interest in the product of their own efforts, and thus may defeat the very purpose in view, of providing for a single uniform system of procedure. Lawyers always seem to approve of the procedure with which they are familiar. Instances are not wanting where the lawyers have openly declared that only the system which they knew could be considered workable at all and that all others must be condemned and despised, even though actually in successful operation in neighboring states.[8] Should the various district committees, following such precedents, recommend drafts of procedure based upon their own experience, we would have a result approaching the static conformity of the early days of the federal system, made more difficult and accentuated by the belief of each committee in the validity of its own recommendations. It is to be hoped, however, that these conditions will not obtain and that the spirit already exhibited by the committees will continue to produce not vested interests in their own ideas, but support for the most workable reforms possible.

The desire to secure suggestions from the federal bar as to the form the rules should take perhaps goes back to the view of those charged with responsibility for rule making that the bar may not be ready for a union of law and equity and that a first step should consist only of developing uniform rules of procedure in actions at law. It seems that the Conference of Senior Circuit Judges has expressed a preference for this plan, and, while no definite decision has been reached by anyone and the matter has not been before the Court itself, the ten-

[7](1935) 20 MASS. L. Q. 43.

[8]MORGAN and Others, THE LAW OF EVIDENCE (1927) 65–98.

dency of those working upon the problem is in that direction. It is this feature of the situation which, in my judgment, affords a real challenge to our profession. I cannot avoid the strong conviction that any half-hearted renovation is a turning of the clock backwards and that no steps of major reform should now be taken at all, unless a complete reform at least as good as the state systems is to be undertaken. Because of the importance of the question, I feel justified in going into the matter at length and with insistence.

One might wonder at the existence of the fear in advance of any direct expression of this point of view from the bar as a whole. True, the judges of the federal courts have been operating under a system ostensibly of divided courts, although, as I propose now to point out, one where substantial amalgamation of law and equity already obtains. As concerns the judges, perhaps this is but the expression of the lawyer's habitual preference for the procedure with which he is most familiar. No expression of opinion to that effect has come from the bar; in fact, all that I have seen—and I have seen a great deal in private correspondence and elsewhere—is strongly the other way. Attention has also been directed to the Act itself, which provides a somewhat different treatment for rules in actions at law only, than for the rules uniting law and equity. The former may be promulgated directly by the Court; the latter do not become effective until they shall have been reported to Congress by the Attorney General at the beginning of a regular session and until after the close of such session.

Here, it is true, is a formal differentiation, one hard to explain in purpose or in practical result. Perhaps when originally drafted in 1922,[9] it may have seemed a proper apology for tacking the more extensive reform onto a bill already nearly enacted into law. But the difference in result is negligible. In neither event is direct power of veto or amendment of the rules reserved to Congress; it can only repeal or otherwise change the Act. True, in one case, the rules are brought directly to its attention; but in the other the rules are promulgated to the public six months before they become effective, and it is hardly to be supposed that the Congress will not hear of them and object if it wishes. And is it not as likely, in fact much more likely, to object to the limited than to the complete reform? For as a matter of sober fact, most of the Congressmen will come from states actually far from the ancient divided system. It should be

[9]As a result of the urging of Chief Justice Taft. See Taft, *Three Needed Steps of Progress* (1922) 8 A. B. A. J. 34, 35; *Possible and Needed Reforms in Administration of Justice in Federal Courts* (1922) 8 A. B. A. J. 601, 604, 607, (1922) 47 A. B. A. REP. 250, 259–261, 268.

emphasized that not merely the states listed as formal exponents of code pleading, but almost all the states of the Union have in essence the combined procedure inaugurated by Field in New York in 1848.[10] In fact, only five or six states—Arkansas, Delaware, Mississippi, New Jersey, Tennessee, Alabama and Vermont (where the judges are also chancellors)—can fairly now be considered to have a system of truly divided courts, with separate tribunals and separate judges; and even in these states there are limitations upon the old system, as in the constitution of the state of Mississippi, where the Supreme Court is prohibited from reversing a case on the ground that it is brought to the wrong court. These states contain only about ten per cent of the population of the country. Many of the larger states of the Union, such as New York, Ohio, Indiana, and California, and the Western states generally, have been code states almost from the origin of code pleading. Others, such as Pennsylvania, Michigan, Georgia, and Texas, have a united procedure though developed apart from the Field reform. Still others, of which Massachusetts is a notable example, although officially spoken of as "common law states," have by a process of development achieved a procedure more truly uniform than that even of some of the code states. Thus, in Massachusetts today a case begun as one in equity can be completed as one at law without change or amendment of the action.[11] The great state of Illinois, long considered as pre-eminently the state exemplifying the common law system, adopted a new Practice Act with the combined procedure, effective on January 1, 1934.[12] One must go back to the past history of this country to find a really divided system. It was hoped that the new federal civil procedure might serve as a model for the procedures of all the states. If, however, it lags behind that enjoyed by ninety per cent of the population of the country, it surely will be anything but a model.

I have said that establishing uniform rules in actions at law involves a retreat from the already substantially accomplished union of law and equity now existing in the federal courts. This point requires more extended treatment. Preliminary to this, however, it may be

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[10]CLARK, CODE PLEADING (1928) 19–22.

[11]Adams v. Silverman, 280 Mass. 23, 182 N. E. 1 (1932); Callahan v. Broadway Nat. Bank, 190 N. E. 792 (Mass., 1934).

[12]Clark, *The New Illinois Civil Practice Act* (1933) 1 U. OF CHI. L. REV. 209; German, *Illinois Civil Practice Act* (1934) 5 Mo. B. J. 85; Hinton, *Pleading Under the Illinois Civil Practice Act* (1934) 1 U. OF CHI. L. REV. 580; Sunderland, *Observations on the Illinois Civil Practice Act* (1934) 28 ILL. L. REV. 861, 864–870; MCCASKILL, JENNER and SCHAEFER, ILLINOIS CIVIL PRACTICE ACT ANNOTATED (1933) 59–61.

said that in the light of most recent developments after the Federal Equity Rules of 1912 and the Law and Equity Act of 1915,[13] and the trend towards coalescence of the two systems thereby brought about, we have in essence vestiges of four procedural systems existing in the federal courts: (1) the state system applied under the Conformity Act, (2) a general federal system at law made necessary by special federal statutes and provisions limiting the operation of the Conformity Act, (3) the old English chancery system as modernized both by federal statutes and by the Equity Rules of 1912, and (4) the united code system developed under these rules and the 1915 Act. In view of their successful operation, it is not probable that rejection of the principles of the last two systems will be contemplated. In other words, the limited reform might consist of substituting a uniform system at law for the first and second, retaining the third and fourth. This means, however, that three systems, instead of a single one, are retained in any event, with perhaps the danger that we actually abolish none and only succeed in adding still another to our already too numerous systems.

The great difficulty under the Conformity Act is that conformity in the law actions is only "as near as may be" to the state process. Various restrictions, some of them of an obviously inherent nature, some of them created by construction of the courts, developed to limit the principle of conformity. Thus, restrictions on the personal conduct of the Judge and the administration of his duties while on the bench, matters concerning his instructions to the jury and conduct of the trial, and in fact the scope of jury trial itself, were not subject to the conformity principle. Nor did this principle govern matters of appellate review, but only proceedings in the trial courts. In view of the historic division of the law and equity procedures and of the language of the Act itself, it is held that the union of law and equity, adopted in so many states, is not applicable to the federal courts, thus rendering an extremely large segment of local procedure inapplicable to the federal system. Jurisdiction, original or appellate, of the federal courts was not enlarged or impaired by the Act and hence the federal courts exercise an independent judgment concerning such problems. Subject to qualifications of this general nature, state practice under the Conformity Act governs the law of procedure in federal courts from the institution of suit to the judgment, provided that it is not violative of a constitutional right and also that Congress has not legislated upon the matter.[14] Since Con-

[13]38 STAT. 956, 28 U. S. C. A. §§ 397, 398 (1926), JUD. CODE, §§ 274a, 274b, Act of March 3, 1915, c. 90.

[14]Clark and Moore, *supra* note 1.

gress has legislated upon a large number of matters, such as the disregarding of defects of form and allowance of amendment, consolidation of cases of a like nature, when the right to litigate *in forma pauperis* exists, when and how service by publication may be had, the time when the defendant in a removed case must plead, and so on in a wide variety of situations, this last exception is a large one. And the entire matter of trials to the court at law without a jury and appellate review in such cases is subject to congressional acts, though the governing rules are quite confused and in need of complete revision.

It will be seen that the conformity principle applies in the main to the pleading stage of the trial, that is, to the presenting of the issues to the court in the recognized Anglo-Saxon form of alternative written statements. Within the limitations set, the cases show that a very considerable degree of conformity or—possibly a better term—*similarity* to the local state procedure has developed. The general situation, with a portion of the procedure governed by federal rule and a portion governed by the analogous state rule, is obviously unsatisfactory. On the other hand, there is an advantage to the local lawyers in using their own pleading techniques, which they probably will not wish to forego; and, unless there is inaugurated the thoroughgoing reform of a uniform system throughout the entire federal judicial establishment, one may sympathize with their position in opposition to another upsetting reshaping of the procedure.

In equity, with the adoption of the Uniform Equity Rules of 1912, a simple uniform system, substantially based on the best procedure in England and America and therefore in purpose and in exact words closely modeled on the existing code practice, was adopted. Moreover, certain of these rules, when supplemented by the provisions of the Law and Equity Act of 1915,[15] brought about the real approach to the amalgamation of law and equity to which I have referred. Rule 22 of the Equity Rules provides for the transfer of an equity action to the law side of the court if it is found that the proceedings should have been had at law, while Rule 23 provides that when any matter ordinarily determinable at law arises in an equity suit it shall be determined in that suit according to the principles applicable, without sending the case to the law side of the court. For some time disputes ensued in the lower federal courts as to the meaning and effect of these provisions and some courts tended to restrict their operation greatly. In final form, however, they were construed in the main as essentially preventing the failure of an equity action, a matter

[15] *Supra* note 13.

especially important in view of the statutory provision, existing ever since the Judiciary Act of 1789, which forbids suits in equity when the remedy at law is plain, adequate, and complete.[16] As a result of these rules, adequacy of the legal remedy should no longer defeat the suit, but merely result in its transfer to the "law side." Under the Law and Equity Act of 1915, the reverse of the picture was taken care of by the provision for the transfer of actions from the law side to the equity side where the matter is one of equitable cognizance, and by the provisions permitting the pleading of equitable defenses in actions at law. Here, too, some dispute arose as to the construction of these statutes, but particularly with the decision of the United States Supreme Court delivered by Chief Justice Taft in *Liberty Oil Company v. Condon National Bank*,[17] it became established in effect that actions on the law side should not fail when equitable disputes arose in them. The *Liberty Oil* case settled the practice as to equitable defenses in accordance with the better code practice of the states, providing in effect for the continuance of the case after the equitable defense had been filed as substantially one in equity.

Under these provisions, the chances of a failure of an action in federal courts on technieal grounds have been greatly lessened. In general, no action should now fail because it has been brought on the wrong side of the court. At lcast the fundamentals of a union of law and equity are thus obtained. But vestiges of the old divided system still remain to puzzle the courts and trouble the litigants. It is submitted that these vestiges are of no benefit whatsoever, but merely cause unnecessary expense, delay, and at times failure of justice. In the interest of efficiency, as well as of substantive right, they should be eliminated in favor of the complete union of law and equity, such as is now so successfully in operation in jurisdictions as widely divergent as England and her colonies, Connecticut, Minnesota, and California.

Among the difficulties arising from these vestiges of the old divided system, the following may be cited as examples:[18]

1. In the event of a mistake in the choice of the form of action, even though the suit should now not fail, a formal transfer to the other "side" of the court is required under the present procedure. This prevents a speedy dispatch of business and occasions much difficulty for the court in deciding first as to the necessity of a transfer and then as to the effect of the mistake in the form of trial and the

[16] 1 STAT. 82, § 16 (1789), 28 U. S. C. A. § 384 (1926).

[17] 260 U. S. 235 (1922).

[18] For citation of authorities illustrating these examples see Clark and Moore, *supra* note 1, at 415–434.

appeal, and whether the objection has been waived or can be waived, or whether the court should raise it of its own motion, and so on. Considerable differences of opinion still exist on these points among the lower federal courts.

2. The necessity in case of such mistake of a formal transfer from one side of the court to the other presents problems about which the courts are still in doubt, where the error has been overlooked by the trial court and is to be corrected by the appellate court. Under these circumstances, what should be the action of the appellate court? May the objection now be considered as waived? If reversal is to be ordered should it be accompanied by an order for transfer or by an order for complete dismissal of the case?

In other words, the requirement of a formal transfer of causes forces decisions of the same degree of technicality of those anciently enforcing the distinctions between law and equity, but for the more unsubstantial purpose of merely a shift from one side of the court to the other, not from one tribunal to another.

3. No provision is made for the combining of legal and equitable claims or causes of action in a single suit. In form, this would appear to make it impossible for a plaintiff to settle an entire dispute in a single action where such claims are involved. Several of the lower federal courts have permitted the plaintiff to avoid the difficulty by pleading his equitable claim in his replication to the defendant's defense, as in a suit on a written policy of insurance, where the replication has set up a mistake in the policy with a demand for its reformation. The Circuit Court of Appeals of the Second Circuit has ruled, however, that equitable defenses are not available to the plaintiff but only to the defendant, under the Act of 1915.[19]

4. No express provision is made for the filing of a legal counterclaim in an equitable action. Since the rules give general permission for pleading counterclaims, such claims have been permitted, but then question arises as to the form of trial. Some courts hold that by such pleading the defendant has waived his right to a jury trial. This is unfortunate because it forces the defendant to forego a substantial right if he follows the quickest and simplest form of procedure. Naturally therefore he will wish to proceed by new and separate suit. Under a true union of law and equity the pleading of such counterclaims should be permitted as of course, but jury trial right is preserved. Here is a commentary upon the claim often made, even now

[19]Keatley v. U. S. Trust Co., 249 Fed. 296 (C. C. A. 2d, 1918), *cert. dismissed on petitioner's motion*, 254 U. S. 658 (1920). But see *contra*, Plews v. Burrage, 274 Fed. 881 (C. C. A. 1st, 1921), and other cases cited in Clark and Moore, *supra* note 1, at 424, n. 184.

raised as a possible objection under the federal Constitution, that the right of jury trial may be lost or impaired by a united system of law and equity. In truth, it may actually be better preserved than under any other system; in any event, the machinery for its preservation is quite clear and adequate. This is a complete answer to the alleged constitutional argument against the union of law and equity, an argument effectively answered by Dean Pound and the American Bar Association's Committee some twenty years ago.[20]

5. While a defendant may file equitable defenses in actions at law, apparently he is not required to do so. He may therefore take the course of forcing two suits upon essentially the same matter if he so desires.

6. It is not clear that third parties may be brought in to answer to equitable defenses presented by the defendant. If they cannot, there exists another reason for not filing such defenses and thus not adjusting the entire dispute in a single action.

7. Doubt has existed as to the form of trial, whether to the court or to the jury, of the combined actions where union is now possible. At first, it was held that all matters, both legal and equitable, could be submitted to the jury, but the *Liberty Oil* case[21] settled that equitable defenses should be tried to the court. Possibly the question may now be considered settled and in accordance with the best code practice; but a unified system would put this matter beyond dispute.

8. The form of appeal, whether the equity review of the facts or merely a correction of errors of law, is in doubt. True, not all the code states have resolved their difficulties as to methods of appeal. New York, for example, still preserves the difference between the equity review and the law review. Nevertheless, it is possible, as in many of the code jurisdictions, to obtain a substantial uniformity of appeal as well as of trial procedure in the two situations.

In general, all these and other similar objections will not arise in states where the code system is in effective operation. It should not now be necessary to have all these technical disputes of detail still arising in the federal system. Furthermore, a system of rules for uniform procedure in the federal courts is at hand in the Federal Equity Rules, with only the slightest of changes to make them applicable to all actions. These Rules already represent an especially advanced view in matters of *pleading*. Beginning at Rule 18, succeeding sections set forth a pleading system immediately applicable

[20]See Report by Roscoe Pound, *Law and Equity in the Federal Courts* (1911) 36 A. B. A. REP. 470, (1911) 73 CENT. L. J. 204; McCormick, *The Fusion of Law and Equity in United States Courts* (1928) 6 N. C. L. REV. 283.

[21]Liberty Oil Company v. Condon National Bank, *supra* note 17.

to a new combined procedure by merely extending their operation from bills in equity to the proposed new civil action of the federal procedure. The rules providing for the abrogation of technical forms, and for free amendment, the simple provisions for stating the case in the complaint, the abolition of demurrers and pleas, the explicit provisions as to the answer, with provisions for the filing of as many defenses in the alternative or regardless of consistency as the defendant has—all these and the other accompanying rules represent about the best there is in pleading today. Likewise, the rules for the free joinder of causes of action and of counterclaims are more advanced than that of even the majority of code states and are in line with the English provisions. Rules of joinder of parties, too, may be taken over bodily from the Equity Rules and still be in substantially the exact form of the majority of the codes today. It would be desirable, though not vital to the general objective, to substitute for the rule as to permissive joinder the recent similar changes in New York, New Jersey, Illinois, and California imported from England, providing for joinder of parties whenever there exists a common question of law or fact affecting them all.[22] This step, in view of the fact that the Equity Rules already omit the shackles provided in the New York and California systems through restriction on joinder of causes,[23] would make the rules as to parties more satisfactory than those of the ordinary codes.

In other words, the extension of the Uniform Equity Rules to the proposed new civil action of the combined procedure, with the addition of three new sections—one providing for the single civil action and the pleading of all matters, whether legal or equitable or otherwise, in a single suit; one providing for jury trial as of right in the cases covered by the constitutional requirement; and one providing for waiver of jury trial by failure to make affirmative claim therefor within a certain period[24]—would place the federal system as a whole

[22]These rules as to party joinder have been often discussed, as in Magill, *The New Illinois Civil Practice Act: Pleading* (1933) 1 U. OF CHI. L. REV. 171; *Joinder of Parties in California* (1935) 23 CALIF. L. REV. 320; CLARK, CODE PLEADING (1928) c. 6, 7; 2 CLARK, CASES ON PLEADING AND PROCEDURE (1933) 459 *et seq.*

[23]C. 339 of Session Laws, April 8, 1935, to be effective Sept. 1, 1935, repealed Sec. 258 of the New York CIVIL PRACTICE ACT and inserted in place thereof the following provision: "The plaintiff may unite in the same complaint two or more causes of action whether they are such as were formerly denominated legal or equitable, provided that upon the application of any party the court may in its discretion direct a severance of the action or separate trials whenever required in the interests of justice."

[24]See Clark, *Trial of Actions Under the Code* (1926) 11 CORNELL LAW QUARTERLY 482; Clark, *loc. cit. supra* note 12; Walsh, *Merger of Law and Equity under Codes*

on a par with, and in many respects ahead of, the best code practice of the present day. It would be desirable, of course, to go still further and to suggest improved procedure in such matters as evidence and appellate review. But the first step is the simple, though effective, one of making the Equity Rules the controlling procedure in all civil actions.

Rule-making power by the courts in matters of procedure is now universally acclaimed as perhaps the most important administrative reform in the general field of procedure.[25] There seems little doubt that it is at least a necessary step, whether or not it alone is complete and adequate. Attempts at reform by legislative acts run all the risks of indifference and political manipulation which inhere in popular bodies, coupled with the peculiar difficulties that the general populace is not interested in technical details of pleading, that the lawyer members of the legislature are usually not drawn from the reforming element and are interested in preserving the status quo, and that procedure calls for continual supervision and revision of a technical nature and does not lend itself to the occasional spasmodic pronouncement of statute law couched in terms of vague authoritativeness. The courts, on the other hand, possess the expert skill to make improvements in procedure. The real difficulty is how to stimulate them into effective action. It is now considered that some continuing committee containing both professional and popular elements should exist to provide the spur for judicial rule making. Decision upon the present problems of federal rule making is therefore most significant not merely as it may shape federal civil procedure for many years to come, but in the promise it may give, or perhaps fail to give, of effective methods of procedural reform for the future. The beginning made in arousing interest in the federal districts all over the country has been auspicious; one may hope that the results may be sufficiently expert and complete to demonstrate the success of rule making by the courts.

EPILOGUE

On May 9, 1935, a few days after the delivery of the above lecture, the Chief Justice, in his annual address to the American Law Institute

and Other Statutes (1929) 6 N. Y. U. L. REV. 157; Cook, *Equitable Defenses* (1923) 32 YALE L. J. 645.

[25]There is an extensive literature on the subject of rule making by the courts. See *The Rule-Making Power; A Bibliography* (1930) 16 A. B. A. J. 199, and *cf.* a a series of articles in the CALIFORNIA STATE BAR JOURNAL, *viz.* (1930) 5 CALIF. ST. B. J. 377, 406 (1931) 6 *ibid.* 8, 205, 215, 237, (1932) 7 *ibid.* 20 and current numbers of the JOURNAL OF THE AMERICAN JUDICATURE SOCIETY.

in Washington, D. C., announced the decision of the Court to proceed with the preparation of rules for the union of law and equity, as advocated above. With persuasive and convincing force the Chief Justice answered the arguments which may be raised against this step. He then continued:

> "After careful consideration, the Court has decided not to prepare rules limited to common law cases but to proceed with the preparation of a unified system of rules for cases in equity and actions at law, 'so as to secure one form of civil action and procedure for both,' so far as this may be done without the violation of any substantive right.
>
> "In entering upon this task, the Court will welcome the aid of the Bench and Bar, of the Department of Justice, and of all those interested in the improvement of procedure. It is manifest, however, that the Court must itself assume the responsibility of preparing the rules.
>
> "In order that the Court may be suitably aided in this undertaking, the Court will shortly announce the appointment of an Advisory Committee, responsible to the Court, which will be called upon for such assistance as the Court may from time to time require. The Committee will be in touch with all helpful agencies, with the Department of Justice, with lawyers and expert students of procedure, and will be able to bring to the Court aid and advice of the highest value."[26]

This is convincing augury of the success of federal rule making.

[26]U. S. L. Week, May 14, 1935, at 16.